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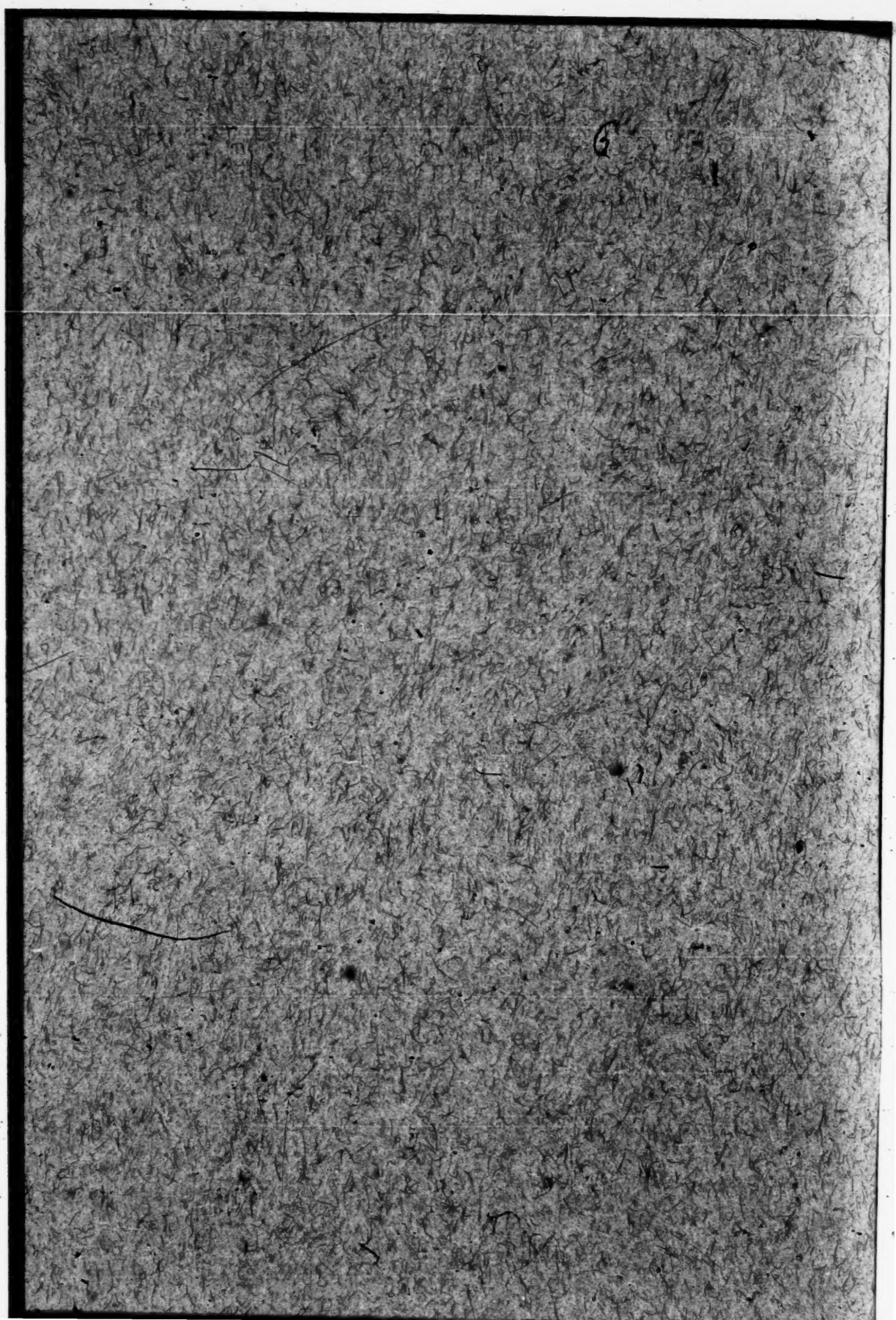

# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 689

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ARNOLD FAIRBANK, d/b/a ARNOLD FAIRBANK CATTLE COMPANY, ET AL., PETITIONERS

*v.*

CLIFFORD H. HARDIN, Secretary of Agriculture, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-8a) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on May 8, 1970. A timely petition for rehearing was

denied June 17, 1970. The petition for a writ of certiorari was filed on September 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether substantial evidence supports the Secretary's determination that petitioners violated the Packers and Stockyards Act.

2. Whether, in the circumstances of the case, petitioners were afforded due process.

## STATEMENT

This action challenges a decision, rendered in connection with a disciplinary proceeding brought by the Secretary of Agriculture, that petitioners willfully violated Sections 312(a) and 401 of the Packers and Stockyards Act, 42 Stat. 159, as amended, 7 U.S.C. 213(a) and 221, and several regulations promulgated thereunder.

Petitioners were livestock dealers engaged in the business of buying and reselling cattle for their own account. The Department of Agriculture's Judicial Officer found that on 50 separate occasions, over an eight month period, petitioners knowingly sold cattle to various customers at false and incorrect weights, calculated by adding an arbitrary number of pounds to the weights at which petitioners had purchased the particular cattle (Pet. App. 22a-26a). The Judicial Officer also found that in conducting the transactions at issue, petitioners purported to adhere to the local

custom of selling livestock at the purchase weight (Pet. App. 22a). According to the Judicial Officer, petitioners depended on the assumption on the part of the various purchasers that the incorrect weights at which they sold the cattle were the purchase weights (Pet. App. 31a); in fact, the livestock sold on each occasion weighed substantially less than the weights they represented (Pet. App. 23a-26a).[1] In all, petitioners were able to inflate the actual purchase weight of 5,000 animals sold in these transactions by 77,531 pounds, and to collect an additional $16,814.98 from the purchasers (Pet. App. 2a).

The Secretary's complaint was issued after an audit of petitioners' records. It was based, in part, on regulations promulgated in 1958, which made the practices with which petitioners were charged unlawful. Initially, petitioners sought to have these regulations amended or repealed on the ground that they were unresponsive to existing conditions in the livestock industry (Pet. App. 11a-14a). When the Secretary denied this motion (Pet. App. 14a-15a) prior to the hearing, petitioners moved for production of the Secretary's entire investigatory file relating to the charges lodged against them (Pet. App. 16a-17a). This motion, too, was denied.

An evidentiary hearing was held before a department hearing examiner. The government adduced what the Ninth Circuit described as "voluminous proof" in support of the charges (Pet. App. 3a). In

[1] Weight losses in transit reduced the livestock weight at its final destination to less even than its weight at petitioners' purchase (Pet. App. 22a, 27a).

response to petitioners' request, they were furnished with those parts of the Secretary's investigatory file that related to the testimony of government witnesses (Pet. App. 6a), to assist them in cross-examination (See, *e.g.*, Tr. 184-185, 211-212, 351, 365-366, 454-455, 484, 944-945). The hearing examiner found that the portions not furnished to petitioners were not relevant to the testimony given at the hearing.

Before the court of appeals, petitioners claimed that, immediately after the conclusion of the evidentiary hearing but before the hearing examiner's proposed decision, they had discovered evidence that the testimony given against them by several rebuttal witnesses was perjured (Pet. App. 39a). The court refused to reopen the record to receive evidence of this charge. Petitioners had not made the claim before the hearing examiner; indeed, they did not assert it until their oral argument before the department's Judicial Officer, approximately 15 months after they had the information upon which the claim rested.[2] It was only after the case was in the court of appeals that petitioners specifically identified the allegedly perjured testimony (Pet. App. 38a-41a, 59a-60a).

On the basis of the evidence at the hearing, the Judicial Officer found that petitioners had willfully violated 7 U.S.C. 213(a) and 221 and 9 C.F.R. 201.46, 201.49 and 201.55 by (1) selling livestock at false weights, issuing invoices and collecting payments on

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[2] The Judicial Officer found that, even if petitioners' unsupported assertions of perjury were true, the "conclusions [that petitioners had violated the Act] would be unaffected" (Pet. App. 35a).

false weights; and (2) failing to keep accurate records required by the Act. He suspended petitioners' registration under the Packers and Stockyards Act for six months, and also entered a cease-and-desist order.

The Ninth Circuit affirmed, holding that the "record * * *, beyond doubt, supports the findings of the [Judicial Officer]" (Pet. App. 3a). Upon reviewing the investigatory file *in camera*, the court also held that petitioners had been given every statement, record, and document in the Secretary's possession to which they were entitled under the Packers and Stockyards Act or the Constitution. It found that the portions of the file withheld from the petitioners were irrelevant to the testimony given at the hearing, and thus were properly excised by the hearing examiner. The court also found that the regulations involved were valid.

## ARGUMENT

1. There is no occasion to review the court of appeals' factual determination that the Judicial Officer's findings are supported by substantial evidence (Pet. 16-18).

2. Similarly, petitioners' contentions that they have been denied due process raise no issue warranting review. When petitioners claimed a right to inspect the entire contents of the Secretary's investigative report, the court of appeals itself reviewed the file and concluded that the material withheld from petitioners did "not relate to the subject matter of the testimony of the witness purporting to make the statement" (Pet. App. 6a). Accordingly, *Jencks* v. *United States*, 353 U.S. 657, is inapplicable.

3. Petitioners' allegations of perjury stand on no better footing. Although petitioners claimed to have learned of the alleged perjury immediately subsequent to the conclusion of the evidentiary hearings (Pet. App. 57a-59a), they waited until the last moment before raising the issue in the administrative proceedings, frustrating any administrative consideration of the matter.[3] This factor distinguishes the case from *Communist Party* v. *Control Board*, 351 U.S. 115, where this Court found that the basis for challenging the allegedly perjurious testimony did not arise until after the conclusion of the administrative proceedings. 351 U.S. at 125. In these circumstances, the court of appeals did not abuse its discretion under 7 U.S.C. 194(f) by refusing to order the hearing reopened for the reception of further evidence.

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[3] The Office of the Inspector General of the Department of Agriculture did investigate the possibility of perjury after petitioners had made their claim in oral argument before the Judicial Officer. It did so even though it was the Judicial Officer's understanding at the time that petitioners did not want any further investigation (Pet. App. 35a). The Inspector General's report to the Secretary concludes that there was no reason to believe that any of the rebuttal witnesses gave false testimony. In light of this report, which was filed during the proceedings in the court of appeals, there was no occasion for the Secretary to correct the record.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1970.

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